

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION,

Defendants.

MOTOROLA MOBILITY, INC., and
GENERAL INSTRUMENT CORPORATION,

Plaintiffs/Counterclaim Defendant,

v.

MICROSOFT CORPORATION,

Defendant/Counterclaim Plaintiff.

CASE NO. C10-1823-JLR

MOTOROLA MOBILITY'S AND
GENERAL INSTRUMENT'S DAUBERT
MOTION TO EXCLUDE CERTAIN
TESTIMONY OF PLAINTIFF'S
EXPERTS DRS. LYNDE, MURPHY, and
SIMCOE

**NOTED ON MOTION CALENDAR:
September 10, 2012**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Argument	2
A.	Expert Testimony: Rule 702 and the <i>Daubert</i> Analysis	2
B.	Drs. Lynde’s, Murphy’s, and Simcoe’s Multilateral Negotiation Methodology Is Not Reliable – It Is Simply Wishful Thinking	3
1.	RAND Terms Result From Bilateral, not Multilateral, Negotiations	3
2.	Microsoft’s Experts’ Opinions Are Not Based On A Methodology That Provides Reliable Results	10
III.	Conclusion	15

TABLE OF AUTHORITIES**Page(s)****CASES**

<i>Bryant v. Wyeth</i> , No. 04-1706, 2012 U.S. Dist. LEXIS 100706 (W.D. Wash. July 19, 2012)	3
<i>Daubert v. Merrell Dow Pharms. Inc.</i> , 509 U.S. 579 (1993).....	2, 3, 14, 15
<i>Many Cultures, One Message v. Clements</i> , 830 F. Supp. 2d 1111 (W.D. Wash. 2011)	3
<i>United States v. Freeman</i> , 498 F.3d 893 (9th Cir. 2007)	3, 15

OTHER AUTHORITIES

Roger G. Brooks & Damien Geradin, <i>Interpreting and Enforcing the Voluntary FRAND Commitment</i> , <i>International Journal of IT Standards and Standardization Research</i> , 9(1), 1-23, January-June 2011	7
Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, <i>The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking</i> , 14 B.U. J. Sci. & Tech. L. 144 (2008)	7
Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, <i>The Ex Ante Auction Model for The Control of Market Power in Standard Setting Organizations</i> , CEMFI Working Paper No. 0703, May 2007	7
Damien Geradin & Miguel Rato, <i>Can Standard-Setting lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND</i> , TILEC Discussion Paper, DP 2006-032 (Ex. 30), at 12 (Nov. 2006).....	7
Anne Layne-Farrar, A. Jorge Padilla, & Richard Schmalensee, <i>Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments</i> , 74 Antitrust L.J. 671 (2007).....	7
Doug Lichtman, <i>Understanding the RAND Commitment</i> , 47 Hous. L. Rev. 1023 (2010-11)	7
Mario Mariniello, <i>Fair, Reasonable, and Non-Discriminatory (FRAND) Terms: A Challenge for Competition Authorities</i> , <i>Journal of Competition Law & Economics</i> , 7(3), 523-41 (2011).....	7

1	Fed. R. Evid. 402	1
2	Fed. R. Evid. 702	1, 2, 3, 14

Defendants Motorola Mobility, Inc. and General Instrument Corporation (collectively, “Motorola”), pursuant to Rules 402 and 702 of the Federal Rules of Evidence, hereby move for an Order precluding certain testimony of three of Plaintiff Microsoft Corporation’s (“Microsoft”) expert witnesses – Kevin M. Murphy, Matthew R. Lynde, and Timothy S. Simcoe – on the grounds that their opinions are not based on a reliable methodology. This motion should be granted for the reasons set forth below.

I. INTRODUCTION

“A prospective implementer that has requested a license *will negotiate on a private bilateral basis* with the patent owner to determine whether they can arrive at a mutually acceptable agreement on RAND terms.”

“RAND-based IPR policies provide a flexible framework *to help enable customized bi-lateral negotiations* for patent licenses that generally are not limited to just the essential patent claims in connection with a standard.”¹

These are Microsoft’s own words. The first quote, from Microsoft’s General Manager of Standards Strategy, Amy Marasco, appeared in a 2007 presentation regarding IPR policies and essential licenses. (Ex. 1 at 8.) The second statement was made in a June 14, 2011 submission to the FTC by Ms. Marasco and David Heiner, Microsoft’s Deputy General Counsel. (Ex. 2 at 3.) In these statements, Microsoft unquestionably acknowledges that RAND terms are determined through bilateral negotiations. Consistent with Microsoft’s understanding, Motorola’s position in numerous Court filings in this case is that RAND terms should be determined, in a manner similar to the well-known *Georgia-Pacific* analysis, through a hypothetical bilateral negotiation between Motorola and Microsoft. Microsoft has never challenged this methodology in any of its Court filings.

Never, that is, until Microsoft served its RAND-related expert reports in this case. In those reports, Microsoft, through its experts Drs. Lynde, Murphy and Simcoe, alleges for the first time that RAND terms should be determined through the “lens” of “multilateral,” rather than bilateral,

¹ “Ex. ____” refers to the stated Exhibit to the Declaration of Samuel L. Brenner, submitted concurrently herewith. All emphasis is added unless otherwise indicated.

1 negotiations.² While Microsoft's experts do not provide an explicit definition of a "multilateral
 2 negotiation" and how it would be implemented, [REDACTED]

3 [REDACTED]
 4 [REDACTED]
 5 There is no basis in fact for the claim of Microsoft's experts that RAND terms must be
 6 based on such a multilateral negotiation, or that multilateral negotiations are even the preferable
 7 way to determine RAND terms. Nearly all license agreements are consummated after bilateral
 8 negotiations, and therefore such agreements are a genuine predicate for the hypothetical
 9 negotiation of *Georgia-Pacific*. In contrast, the kinds of *ex ante* multilateral negotiations
 10 envisioned by Microsoft's experts do not take place in the real world, so there is no real-world
 11 "lens" for Microsoft's construct. Using these theoretical and undefined multilateral negotiations
 12 to determine RAND terms is an unreliable methodology that will produce terms that are without a
 13 rational basis and will be unhelpful to the factfinder. Accordingly, any opinion based on such a
 14 methodology should be excluded, and the portions of the reports of Drs. Murphy, Lynde, and
 15 Simcoe described herein should be stricken.

16 **II. ARGUMENT**

17 **A. Expert Testimony: Rule 702 and the *Daubert* Analysis**

18 Rule 702 governs the admissibility of expert testimony. Rule 702 sets out four
 19 requirements for expert testimony: (1) "the expert's scientific, technical, or other specialized
 20 knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (2)
 21 "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable
 22 principles and methods"; and (4) "the expert has reliably applied the principles and methods to the
 23 facts of the case." *See also Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

24
 25 ² [REDACTED]
 26 [REDACTED]

1 “Federal Rule of Evidence 702 charges trial judges with the task of ensuring ‘that any and
 2 all scientific testimony or evidence admitted is not only relevant, but reliable.’ The gatekeeping
 3 role exercised by district courts ‘entails a preliminary assessment of whether the reasoning or
 4 methodology underlying the testimony is . . . valid and of whether that reasoning or methodology
 5 properly can be applied to the facts in issue.’ This role applies to all expert testimony, not only to
 6 ‘scientific’ expert testimony.” *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007)
 7 (citations omitted); *see also Daubert*, 509 U.S. at 589. Microsoft must demonstrate the
 8 admissibility of its experts’ testimony by a preponderance of the evidence. *Daubert*, 509 U.S. at
 9 588-90; *Bryant v. Wyeth*, No. 04-1706, 2012 U.S. Dist. LEXIS 100706, *5 (W.D. Wash. July 19,
 10 2012); *Many Cultures, One Message v. Clements*, 830 F. Supp. 2d 1111, 1136 (W.D. Wash. 2011).

11 **B. Drs. Lynde’s, Murphy’s, and Simcoe’s Multilateral Negotiation Methodology**
 12 **Is Not Reliable – It Is Simply Wishful Thinking**

13 Drs. Lynde and Simcoe state throughout their reports that RAND terms should be
 14 determined through the “lens” of multilateral negotiations. (*See, e.g.*, Ex. 7 at 17-23; Ex. 8 at 1, 4-
 15 5, 9-10; Ex. 5 at 7, 27, 37; Ex. 6 at 2-3, 7-8, 28.) However, as shown below, the policies and
 16 guidelines of the SSOs themselves, the understanding in the industry, Microsoft’s own documents,
 17 and the testimony and admissions of Microsoft’s own witnesses make clear that RAND terms are
 18 determined through bilateral negotiations. Thus, a methodology based on a multilateral, rather
 19 than bilateral, negotiation is simply wishful thinking by Microsoft as to how it might like RAND
 20 negotiations to work. Because that methodology does *not*, in fact, reflect how RAND negotiations
 21 *actually* work, it is not reliable, and will not produce reliable results. Fed. R. Evid. 702.

22 **1. RAND Terms Result From Bilateral, not Multilateral, Negotiations**

23 **SSO Policies and Motorola’s Letters of Assurance (“LOAs”).** As this Court explained
 24 in its June 6, 2012 Order, “the language of Motorola’s agreements with the IEEE and the ITU
 25 envisions a negotiation between the parties towards a resulting RAND license.” (Dkt. No. 335 at
 26 24.) “Motorola,” the Court added in the same Order, “correctly asserts that the IEEE and ITU

1 Policies contemplate that RAND licenses *will be negotiated between the patent holder and the*
 2 *implementer of the standard.*” (*Id.* at 18.)

3 Critically, the Court’s observations correctly reflect the actual language and meaning of the
 4 LOAs Motorola sent to the ITU and IEEE – the actual contracts to which Microsoft is a third-party
 5 beneficiary. For example, Motorola’s LOAs to the ITU make clear that the negotiations over the terms
 6 of RAND licenses “*are left to the parties concerned* and are performed outside the ITU-T ISO/IEC.”
 7 (Ex. 15 at MOTM_WASH1823_0000039; *see also id.* at MOTM_WASH1823_0000036
 8 (“Negotiations are left to the parties concerned and are performed outside the ITU-T, ITU-R, ISO,
 9 or IEC.”); 046 (same); 053 (same); 057 (same); 061 (same).) Consistent with Motorola’s LOAs,
 10 moreover, the “Common Patent Policy” for the ITU states:

11 The detailed arrangements arising from patents (licensing, royalties, etc.) *are left*
 12 *to the parties concerned*, as these arrangements might *differ from case to case*.

13 (Ex. 13 at 8.) Indeed, the ITU’s Legal Officer has explicitly stated that there is “[n]o uniform
 14 definition of RAND” and that “[t]he licenses and their prices are generally *negotiated* on a
 15 *bilateral* basis between the patentee and each licen[s]ee, outside the [SSOs].” (Ex. 19 at 12.)
 16 There can be no question that the ITU, which recognizes that the terms of RAND licenses may “differ
 17 from case to case,” envisions and expects that such differing terms will result from bilateral
 18 negotiations between “*the parties concerned*,” and *not* from some kind of multilateral negotiation with
 19 full participation of patent holders and potential standards implementers.³

20 Similarly, Motorola’s contractual commitments to the IEEE make clear that the IEEE does
 21 *not* mandate or even recommend that licensing negotiations resemble a multilateral negotiation as
 22 required by Microsoft’s experts. The IEEE patent policy expressly states that the “IEEE is not
 23 responsible . . . for determining whether any licensing terms or conditions provided in connection

24 ³ Microsoft’s experts focus on the use of patent pools as a proxy for multilateral *ex ante* negotiations. (*See, e.g.*,
 25 Ex. 7 at 3, 22; Ex. 8 at 9; Ex. 5 at 7; Ex. 6 at 2; Ex. 21 at 153, 156.) Microsoft has also suggested that the only
 26 material term in RAND licenses that is left open is the RAND royalty. (July 9, 2012 Telephone Conf. Tr. at 6.)
 Given Microsoft’s arguments, the multilateral methodology suggested by Microsoft’s experts would apparently result
 in a single set of terms applicable for any license under a RAND commitment – a result that is obviously inconsistent
 with the ITU’s own understanding that the terms of RAND licenses will differ from licensee to licensee.

1 with submission of a Letter of Assurance, if any, or in any licensing agreements are reasonable or
 2 non-discriminatory.” (Ex. 12 at MOTM_WASH1823_0054739.) Motorola’s LOAs to the IEEE
 3 expressly state that “[t]he IEEE takes *no position* with respect to the reasonableness of rates,
 4 terms, and conditions of the license agreements *offered by patent holders or patent applicants.*”
 5 (Ex. 16 at MOTM_WASH1823_0000002; *see also id.* at 06 (same); 08 (same); 10 (same); 12
 6 (same); 14 (same); 16 (same); 18 (same); 21 (same); 23 (same); 25 (same); 27 (same); 29 (same);
 7 31 (same); 33 (same).)

8 Like the ITU, the IEEE envisions that the terms of RAND licenses will be the product of
 9 bilateral negotiation between the parties to the resulting license. In fact, the IEEE’s Antitrust and
 10 Competition Policy actually goes so far as to *forbid* parties in the IEEE from engaging in
 11 multilateral discussions about RAND terms during the technical standards setting process.⁴ (Ex.
 12 20 at 3.) Indeed, the IEEE’s Standards Board Operations Manual mandates that “no discussions or
 13 other communication[]” of “[s]pecific patent license terms . . . other than distribution of Accepted
 14 Letters of Assurance” “shall occur during IEEE-SA working group standards-development
 15 meetings or other duly authorized IEEE-SA standards-development technical activities.” (Ex. 22
 16 at § 5.3.10.2.)

17 In other words, the IEEE forbids the multiple parties engaged in the standards-setting
 18 process from engaging in multilateral negotiations regarding RAND terms during the IEEE
 19 standards-setting proceedings. *Forbidding* multilateral negotiations in key *ex ante* contexts is
 20 obviously a far cry from *requiring* such negotiations, or even requiring that the normal bilateral
 21 negotiations between the parties to a license *resemble* multilateral negotiations, as asserted by
 22 Microsoft’s experts. Such a reading drastically misrepresents Motorola’s contractual
 23

24
 25
 26 ⁴ Recently, a group of 13 companies announced the launch of an exploratory forum under the IEEE’s “Industry Connections” program that will consider whether an 802.11 patent pool can be created. Such a pool – if it ever gets past the exploratory stage and actually gets formed – would presumably involve at least a partial multilateral negotiation to determine the terms of the pool agreement. Given that the 802.11 standard was first published nearly 15 years ago, any such negotiation is not the type of multilateral *ex ante* negotiation envisioned by Microsoft’s experts.

1 commitments in its LOAs and the actual process employed by patent holders in the marketplace to
 2 determine RAND terms.

3 **Understanding of the Industry and Academics.** Both industry participants and
 4 academics considering the meaning of the RAND commitment understand that a RAND license is
 5 the product of bilateral negotiations between the patent holder and the prospective licensee. One
 6 example of this industry understanding is the comments submitted in connection with the FTC's
 7 2011 Workshop on Standard-Setting Issues. In one comment, for instance, the Association for
 8 Competitive Technology recognized that the "practice" regarding licensing in the standards
 9 context is "*bilateral negotiations*." (Ex. 23 at 5.) Similarly, the Telecommunications Industry
 10 Association explained that "[t]he RAND framework has enabled industry participants *to*
 11 *bilaterally negotiate* effective license agreements that meet the specific needs of each licensee and
 12 licensor." (Ex. 24 at 10.) Michele Herman, then a partner at Davis Wright Tremaine LLP (and
 13 Microsoft's former Senior Director of Intellectual Property Strategy) observed that, "[b]ecause
 14 standards-essential patent claims are not licensed in isolation, it is necessary for parties to
 15 *negotiate their own bilateral agreements* irrespective of whether specific patents or license terms
 16 are disclosed to the SSO *ex ante*." (Ex. 25 at 5.) Nokia observed in its own comment that "the
 17 normal way" is for royalties in the standards context "*to be negotiated bilaterally*." (Ex. 26 at 7.)
 18 These comments are not unexpected, given that the FTC itself, in its request for comments,
 19 observed that "[s]etting specific terms of the patent license generally occurs in *bilateral*
 20 *negotiations between the patent holder and individual standards users* after the standard-setting
 21 process is completed, sometimes long after the standard has been implemented." (Ex. 27 at
 22 28037.) None of this is surprising – patent licenses are negotiated bilaterally, not negotiated
 23 multilaterally.

24 Even a cursory survey of the legal and economic literature on RAND demonstrates that the
 25 overwhelming understanding among economists and legal academics mirrors the understanding of
 26 industry participants, that (absent the future adoption of some new RAND policy by an SSO) the

holders of SEPs and the SSOs envision that licenses on RAND terms will be the product of bilateral negotiations between the patent holder and the prospective licensee. *See, e.g.:*

- Roger G. Brooks & Damien Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, *International Journal of IT Standards and Standardization Research*, 9(1), 1-23, January-June 2011 (Ex. 14), at 20 n.10 (“‘Fair and reasonable’ licensing terms would therefore consist of those terms determined through fair, **bilateral negotiations** between individual IPR owner and standard implementer in accordance with the market conditions prevailing at the time of such negotiations.”);
- Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, *The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. Sci. & Tech. L. 144 (Ex. 29), 148 (2008) (recognizing the “current SSO system of confidential **bilateral negotiations**”);
- Damien Geradin, Anne Layne-Farrar, & A. Jorge Padilla, *The Ex Ante Auction Model for The Control of Market Power in Standard Setting Organizations*, CEMFI Working Paper No. 0703, May 2007 (Ex. 28), at 32 (“**Actual negotiations take place bilaterally** and confidentially . . .”);
- Damien Geradin & Miguel Rato, *Can Standard-Setting lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND*, TILEC Discussion Paper, DP 2006-032 (Ex. 30), at 12 (Nov. 2006) (“‘Fair and reasonable’ licensing terms would therefore consist of those terms determined through fair, **bilateral negotiations** between individual IPR owner and standard-adopter in accordance with the market conditions prevailing at the time of such negotiations.”);
- Anne Layne-Farrar, A. Jorge Padilla, & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of Frand Commitments*, 74 Antitrust L.J. 671 (Ex. 31), 705 (2007) (noting that RAND rates are set by the parties “through **bilateral negotiations**”);
- Doug Lichtman, *Understanding the RAND Commitment*, 47 Hous. L. Rev. 1023 (Ex. 18), 1044-45 (2010-11) (“After a standard has been promulgated, firms that wish to invoke the RAND commitment must still contact the relevant patent holders and **negotiate their own bilateral deals**. . . . every other participant in that same standard-setting process ultimately found itself in a similar, overlapping, confidential, **bilateral negotiation**.”); and
- Mario Mariniello, *Fair, Reasonable, and Non-Discriminatory (FRAND) Terms: A Challenge for Competition Authorities*, *Journal of Competition Law & Economics*, 7(3), 523-41 (Ex. 32), 532 (2011) (“I take the view that **FRAND is the outcome of a bilateral hypothetical negotiation** between the licensor and the licensee . . .”).

1 This consensus among industry participants and academics is even fully reflected in the
 2 understandings of professional legal organizations. For example, the American Bar Association's
 3 Standard Development Policy Manual, which was prepared with "substantial editorial and
 4 substantive assistance" (Ex. 17 at v), from Amy Marasco (Microsoft's General Manager of
 5 Standards Strategy) and Michele Herman (Microsoft's former Senior Director of Intellectual
 6 Property Strategy), recognizes that when users of a standardized technology seek out licenses
 7 covering their use, RAND commitments are determined through bilateral negotiations:

8 "[RAND] licensing commitment[s are] often stated as an absolute (*i.e.*, that the
 9 [patent owner] must grant the required licenses). However, it is reasonable to
 10 require that such licenses be granted only upon a request by a potential licensee
 and upon the conclusion of *bilateral negotiations*."

11 (Ex. 17 at 49.)

12 **Statements by Microsoft.** The unsupported assertions of Drs. Lynde, Murphy, and
 13 Simcoe about the supposed need for RAND negotiations to resemble multilateral negotiations are
 14 particularly surprising given that Microsoft *itself* knows that RAND negotiations are bilateral. For
 15 example, as noted above, Ms. Marasco explained in a presentation regarding IPR policies and
 16 essential licenses that "[a] prospective implementer that has requested a license will negotiate on a
 17 private *bilateral* basis with the patent owner to determine whether they can arrive at a mutually
 18 acceptable agreement on RAND terms." (Ex. 1 at 8.) Similarly, in a June 14, 2011 submission to
 19 the FTC regarding a Patent Standards Workshop, Ms. Marasco and David Heiner, Microsoft's
 20 Deputy General Counsel, reiterated that "RAND-based IPR policies provide a flexible framework
 21 to help enable *customized bi-lateral negotiations* for patent licenses that generally are not limited
 22 to just the essential patent claims in connection with a standard." (Ex. 2 at 3.)

23 Consistent with this understanding, Mr. Heiner testified in *this case* that RAND license
 24 terms are typically arrived at through bilateral negotiation:

25 Q: You agree that RAND license terms are typically arrived at through bilateral
 negotiation, correct?

26 A: Typically, yes.

1 ...

2 Q: In large part, the parties collectively and bilaterally determine what is RAND in
3 their specific contexts through negotiations, correct?

4 A: Typically.

5 (Ex. 9 at 33:6-8; 39:10-13.) Mr. Heiner also agreed that licensing considerations “would typically
6 be fleshed out *as part of bilateral negotiations* between the [prospective] licensor and
7 [prospective] licensee.” (*Id.* at 32:15-18.) Finally, Mr. Heiner confirmed that “there will at times
8 be significant contention between the patent owner and implementer about what constitutes
9 reasonable licensing terms, but this is to be expected, as with commercial negotiation on any input
10 cost component, and *has for the most part been readily resolved through bilateral negotiations.*”
11 (*Id.* at 37:10-17.) Neither Dr. Murphy nor Dr. Simcoe considered this testimony.

12 **Microsoft’s Own Experts.** Given the overwhelming evidence that the SSOs envision
13 bilateral negotiations of RAND licensing terms, and that this understanding is shared by the
14 industry in general and Microsoft in particular, it is not surprising that even Microsoft’s *own*
15 *experts* – despite the contrary statements in their expert reports – explicitly recognize that RAND
16 terms are the result of bilateral negotiations. For example, in testifying before the ITC, Dr.
17 Murphy [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 In his expert report in this litigation – the expert report in which he concluded that, as a
4 theoretical matter negotiations leading to RAND terms should be viewed through a *multilateral*
5 lens – Professor Simcoe himself conceded that his theory “*does not* imply that all negotiations
6 should be multilateral,” and that “[m]any SSO intellectual property policies clearly contemplate
7 *bilateral negotiation of RAND terms and conditions.*” (Ex. 7 at ¶ 95.) Professor Simcoe’s
8 recognition that the SSOs *actually* contemplate bilateral, rather than multilateral, negotiations is in
9 accordance with what Professor Simcoe has said in previous publications and obliterates
10 Microsoft’s attempt to divert this proceeding into an unsupportable multilateral negotiation. For
11 example, in comments recently provided to the FTC, Professor Simcoe stated that:

12 One approach to the “reasonable” prong of the RAND commitment is to treat it as a
13 promise to forgo lost profits as the approach to calculating damages in patent
14 infringement litigation. In its place, courts would presumably set reasonable
15 royalty damages based on a *hypothetical negotiation between a willing licensor*
16 *and willing licensee.*

17 (Ex. 11 at 9; *see also id.* at 16.)
18 [REDACTED]
19 [REDACTED]

20 Despite these statements, Drs. Murphy, Simcoe, and Lynde now – in the context of their
21 representation of Microsoft in this litigation – assert that RAND terms should be determined based
22 on a multilateral negotiation that does not ever occur or, more obtusely, should be viewed through
23 the “lens” of such a negotiation.

24 **2. Microsoft’s Experts’ Opinions Are Not Based On A Methodology That** 25 **Provides Reliable Results**

26 Despite the facts described above showing that RAND terms are determined in the real
world through bilateral negotiations and Microsoft experts’ previous statements recognizing that a

1 bilateral determination is appropriate, Microsoft's experts repeatedly assert that, for the purpose of
 2 this litigation, RAND terms should instead be determined based on the undefined concept of a
 3 multilateral negotiation. Microsoft does this to find a way to invoke the low rates offered by
 4 patent pools, which Microsoft tries to analogize to a multilateral negotiation. But patent pools are
 5 not a result of a multilateral negotiation as advocated by Microsoft, and they do not in any event
 6 justify jettisoning all of the evidence that parties to SSO undertakings negotiate RAND licenses
 7 bilaterally in the real world.

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]

17 Dr. Simcoe's assignment in this case was also to "articulate an economic framework
 18 consistent with accepted economic writings and thinking for evaluating proposed terms and
 19 conditions for a license to Motorola's declared essential H.264 and 802.11 patents in light of its
 20 [RAND] licensing commitments." (Ex. 7 at ¶ 6.) Dr. Simcoe describes "RAND licenses through
 21 the *multilateral* ex ante negotiation lens." (*Id.* at 17, 17-23.) He states that, "[f]rom an economic
 22 perspective, RAND terms and conditions should be thought of as those that would have emerged
 23 from *multilateral* ex ante negotiation." (*Id.* at 2; *see also, e.g.*, Ex. 8 at 1, 4-5, 9-10.)

24 Dr. Murphy's assignment in this case was to "provide an economic framework for
 25 analyzing commitments to license [SEPs] on [RAND] terms . . ." (Ex. 3 at ¶ 2; Ex. 4 at ¶ 1.) Dr.
 26 Murphy repeatedly states in his reports that bilateral negotiations would generally not produce

1 proper RAND terms. And while Dr. Murphy did not explicitly discuss multilateral negotiations in
2 his report or his rebuttal, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 As shown above, the SSO contracts at issue, and the commentary on those contracts,
6 reflect the understanding that RAND terms should be determined based on a methodology that
7 contemplates a bilateral negotiation – not a multilateral negotiation. Unlike bilateral negotiations,
8 a multilateral negotiation as envisioned by Microsoft’s experts does not exist in the real world.
9 And creating a hypothetical multilateral negotiation requires a completely different analysis than,
10 and obviously will produce a different result from, a hypothetical bilateral negotiation. For
11 example, in this case, a bilateral negotiation would be limited to negotiations between just
12 Motorola and Microsoft, and would be focused only those factors, considerations and facts
13 relevant to these parties and their respective businesses. When negotiating material terms (e.g.,
14 term, assignability of the agreement, scope of the grant back, field of use, exclusions, carve outs,
15 covered products, etc.), Motorola and Microsoft would emphasize and de-emphasize certain
16 factors, considerations and facts based on each party’s business model and would mold the terms
17 of the license accordingly. Thus, such a negotiation – which ordinarily takes months between just
18 two parties – would reflect compromises and concessions that are specific to Motorola and
19 Microsoft. This is exactly the type of “flexible framework to help enable customized bi-lateral
20 negotiations for patent licenses” envisioned by the SSOs that Microsoft pointed out in its FTC
21 submission. (Ex. 2 at 3.)

22 In contrast, a multilateral negotiation – if one could be contrived – would somehow be
23 focused on factors and considerations relevant to all parties to the negotiation (all patent owners
24 and all potential implementers) and therefore would reflect a different set of compromises and
25 concessions leading to a different result. These differences are exacerbated by the fact that the
26 companies in the multilateral negotiation may have very different business interests, incentives

1 and motivations than both Motorola and Microsoft. Each participant in the negotiation would
 2 presumably emphasize and de-emphasize certain factors and considerations to suit its business
 3 model and ultimate goals, some of which may be completely irrelevant to Motorola and/or
 4 Microsoft. For example, a participant in the multilateral negotiation with broad product exposure
 5 would advocate for rates on the low end of RAND for all other implementers. Similarly, a
 6 participant in the multilateral negotiation that prefers broad adoption of the standard over
 7 receiving the full value of its intellectual property may also push for rates on the low end of
 8 RAND for all participants. [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED] ⁵

13 There are further problems with the multilateral negotiation proposed by Microsoft's
 14 experts and how Microsoft's experts attempt to apply that framework. Microsoft relies on the
 15 MPEG LA H.264 and Via Licensing 802.11 patent pools as a proxy for a multilateral construct.
 16 The fact that Microsoft's experts cannot point to an actual "real world" multilateral negotiation
 17 and instead attempt to use a patent pool as a proxy illustrates that lack of reliability of their
 18 methodology. And even assuming that pools could be a proxy for a multilateral negotiation,
 19 Microsoft's experts rely primarily on just two pools for their analysis. This is in stark contrast to
 20 the nearly 50 actual, bilateral licenses relied on by Motorola's experts. (*See, e.g.*, Dkt. No. 335 at
 21 23.) The dearth of data points further calls into question whether the opinions of Microsoft's
 22 experts are reliable. Indeed, given their lack of real-world comparables, these opinions are
 23 unverifiable.

24 _____
 25 ⁵ Microsoft has made no secret of the fact that its participation in the MPEG LA pool has been about promoting
 26 broad use of the H.264 standard, rather than about receiving the true value of its SEPs. As Dean Hachamovitch, Microsoft's corporate vice president in charge of the Internet Explorer team at Microsoft explained in a May 3, 2010 blog post, "Microsoft pledged its patent rights to [the MPEG LA pool] *in order to make its rights broadly available under clear terms, not because it thought this might be a good revenue stream.*" (Ex. 34 at 1.)

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] And Microsoft's expert reports lack any rational
 16 basis to conclude that the terms of the pool license actually reflect or "mimic" the terms of a
 17 hypothetical multilateral negotiation.⁶ (Ex. 7 at 3.) Indeed, no Microsoft expert has described
 18 how patent pools are a reliable proxy for the multilateral *ex ante* negotiation that they imagine.

19 The critical issue is what Motorola and Microsoft would have done to arrive at a license
 20 consistent with the IEEE and ITU policies and Motorola's RAND assurances. Plainly, they would
 21 have undertaken the bilateral negotiation contemplated by the SSOs and entirely understood by
 22 Microsoft's own executives and others who have negotiated bilateral licenses, rather than
 23

24 ⁶ In addition, the timing of when the MPEG LA and Via Licensing patent pool agreements were negotiated further
 25 demonstrates the unreliability of the conclusions of the opinions of Microsoft's experts. Microsoft's experts focus on
 26 a multilateral negotiation that takes place *before* the standard is adopted. (*See, e.g.*, Ex. 7 at 3, 22; Ex. 8 at 1; Ex. 5 at
 7; Ex. 6 at 2; Ex. 21 at 150-51.) It is undisputed that the terms of the MPEG LA and Via Licensing agreements were
 set *after* the standard was adopted. In the case of Via Licensing, these terms were set more than five years after the
 first 802.11 standard was adopted.

attempting to create and employ some unknown and undefined “multilateral” negotiation. Given (1) the ubiquitous acceptance by academics, Microsoft’s own personnel, and – most importantly – the LOAs and policies of the SSOs themselves that RAND terms are determined through bilateral negotiations, (2) the paucity of evidence that supports Microsoft’s proposed multilateral negotiation methodology, and (3) the questionable application of that methodology to the facts of this case, the opinions of Microsoft’s expert are unreliable and will not be helpful to the jury. Fed. R. Evid. 702; *Daubert*, 509 U.S. 579. As such, the reports and testimony of Drs. Murphy, Lynde, and Simcoe, insofar as they refer to or rely on a multilateral negotiation to determine what the terms of a RAND agreement should be, should be excluded in accordance with the gatekeeping functions set forth by the Supreme Court in *Daubert*. 509 U.S. at 589; *see also Freeman*, 498 F.3d at 901.

III. CONCLUSION

The Court has a duty to serve as a gatekeeper and to exclude expert testimony that is based on an unreliable methodology. The opinions of Drs. Lynde, Murphy, and Simcoe relating to the requirement for a multilateral negotiation construct to determine RAND terms is the type of unreliable evidence the Court has the power to exclude. Microsoft cannot show that its experts’ opinions regarding multilateral negotiations are based on a sufficient factual foundation – or, indeed, *any* factual foundation. The “multilateral” aspects of the reports should be stricken and any testimony offered by Microsoft’s RAND “experts” related to multilateral negotiations in the context of determining RAND terms also should be excluded.

For the foregoing reasons, Motorola respectfully requests that the Court grant this motion.

1 DATED this 27th day of August, 2012.

2 Respectfully submitted,

3 SUMMIT LAW GROUP PLLC

4 By /s/ Ralph H. Palumbo

5 Ralph H. Palumbo, WSBA #04751

6 Philip S. McCune, WSBA #21081

7 Lynn M. Engel, WSBA #21934

8 *ralphp@summitlaw.com*

9 *philm@summitlaw.com*

10 *lynne@summitlaw.com*

11 By /s/ K. McNeill Taylor, Jr.

12 K. McNeill Taylor, Jr.

13 MOTOROLA MOBILITY, INC.

14 MD W4-150

15 600 North U.S. Highway 45

16 Libertyville, IL 60048-1286

17 Phone: 858-404-3580

18 Fax: 847-523-0727

19 And by

20 Jesse J. Jenner (*pro hac vice*)

21 Steven Pepe (*pro hac vice*)

22 Kevin J. Post (*pro hac vice*)

23 Ropes & Gray LLP

24 1211 Avenue of the Americas

25 New York, NY 10036-8704

26 (212) 596-9046

jesse.jenner@ropesgray.com

steven.pepe@ropesgray.com

kevin.post@ropesgray.com

James R. Batchelder (*pro hac vice*)

Norman H. Beamer (*pro hac vice*)

Ropes & Gray LLP

1900 University Avenue, 6th Floor

East Palo Alto, CA 94303-2284

(650) 617-4030

james.batchelder@ropesgray.com

norman.beamer@ropesgray.com

Paul M. Schoenhard (*pro hac vice*)
Ropes & Gray LLP
One Metro Center
700 12th Street NW, Suite 900
Washington, DC 20005-3948
(202) 508-4693
paul.schoenhard@ropesgray.com

***Attorneys for Motorola Solutions, Inc., Motorola
Mobility, Inc., and General Instrument
Corporation***

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.
Christopher T. Wion, Esq.
Shane P. Cramer, Esq.
Calfo Danielson, Harrigan, Leyh & Eakes LLP
arthurh@calfoharrigan.com
chrisw@calfoharrigan.com
shanec@calfoharrigan.com

Richard A. Cederroth, Esq.
Brian R. Nester, Esq.
David T. Pritikin, Esq.
Douglas I. Lewis, Esq.
John W. McBride, Esq.
David Greenfield, Esq.
William H. Baumgartner, Jr., Esq.
David C. Giardina, Esq.
Carter G. Phillips, Esq.
Constantine L. Trela, Jr., Esq.
Ellen S. Robbins, Esq.
Nathaniel C. Love, Esq.
Sidley Austin LLP
rcederroth@sidley.com
bnester@sidley.com
dpritikin@sidley.com
dilewis@sidley.com
jwmcbride@sidley.com
david.greenfield@sidley.com
wbaumgartner@sidley.com
dgiardina@sidley.com
cphillips@sidley.com
ctrela@sidley.com
erobbins@sidley.com
nlove@sidley.com

T. Andrew Culbert, Esq.
David E. Killough, Esq.
Microsoft Corp.
andycu@microsoft.com
davkill@microsoft.com

DATED this 27th day of August, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley